In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1018

C. PARKE MASTERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 383 F.2d 610. The opinion of the district court (Pet. App. A8-A14) is reported at 251 F. Supp. 937.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 1967. A petition for rehearing was

denied on October 30, 1967. On December 24, 1967, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to December 29. On January 4, 1968, Mr. Justice Harlan granted a further extension to January 5. Both extensions were granted "without prejudice to the Court's consideration of whether this application has been filed in time." The petition was filed on January 15, 1968, and is out of time under Rules 22(2) and 34(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether invoices taken by representatives of a trustee in bankruptcy from file cabinets in petitioner's law office kept in a place set aside for the corporation were properly admitted in evidence.

2. Whether the court's instructions constitute plain error.

3. Whether the evidence was sufficient to support petitioner's conviction for bankruptcy fraud.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on ten counts of bankruptcy fraud, in violation of 18 U.S.C. 152. He was fined $1,000 on each count and sentenced to concurrent

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[1] The transcript of trial ("Tr.") has been filed with the clerk of this Court.

terms of imprisonment for one year, the execution of sentence being suspended and petitioner being placed on probation for three years. The court of appeals affrmed.

On January 19, 1961, Twin Lock, Inc., filed a voluntary petition in bankruptcy pursuant to Chapter 11 of the Bankruptcy Act. The bankruptcy court in New York permitted the company to be operated by debtors in possession (Tr. 27), but required the posting of bonds to secure creditors. An accounting firm, represented by Ira Zarett, was appointed to review the accounts of Twin Lock and to prepare monthly profit and loss schedules for the referee (Tr. 25-26, 36, 76).

Petitioner, a New York attorney who had become president of the corporation in 1958 (Tr. 399), resigned as president shortly after the bankruptcy petition was filed, but continued to perform legal services for the corporation. In October 1961, he assumed the lease on the office space occupied by Twin Lock, and subsequently moved his legal practice there while permitting Twin Lock to carry on its business from an outer room (Tr. 307). On several occasions petitioner furnished the funds required by the referee as additional security for creditors (Tr. 319).

Prior to September 1962, almost all of Twin Lock's business was carried on from its California plant. However, in that month the billing procedures were changed. After shipments had been sent from the California plant pursuant to a purchase order, the packing sheets were sent by the plant manager to Twin Lock's New York City office, where invoices

were prepared and sent to the customers by a secretary, Twin Lock's sole full-time employee in New York; payment was remitted to the New York office (Tr. 229-230). The secretary maintained the invoice files and these were used by Zarett for his preparation of accounting schedules (Tr. 39, 232).

After a number of monthly schedules had been prepared by Zarett, it was discovered that many of the invoices were fraudulent in that they reflected fictitious sales. The effect of these false invoices was to inflate the sales figures, thereby increasing the gain or reducing the deficit on the corporation's monthly profit and loss statements which Zarett prepared and submitted to the referee (Tr. 72). As a result the bankruptcy court was fraudulently induced to reduce the amount of the bonds required for the debtor to remain in possession.

At trial, it was shown that Twin Lock's secretary received the information from which she prepared the invoices from three sources: petitioner, the packing sheets sent by Twin Lock's agent in California, or, occasionally, the customers (Tr. 23). The data on the false invoices could not have come from the customers, however, since they had no knowledge of the transactions (Tr. 105-160). Similarly, the records maintained by the California plant manager indicated that he had not provided the information contained in the false invoices (Tr. 194).

ARGUMENT

1. Prior to trial petitioner moved to suppress certain invoices obtained by Zarett and the attorney for

the trustee from file cabinets which were reserved solely for Twin Lock's use and were situated in the outer room of petitioner's suite of law offices. This motion was denied without a hearing on the ground that action by private individuals is not within the purview of the Fourth Amendment. At trial, petitioner renewed his motion, and Zarett testified that in January 1964, he and an attorney for the trustee in bankruptcy entered the outer office during business hours, identified themselves to Twin Lock's secretary, who admitted them, and proceeded to gather up the records.[2] The trial judge concluded that the ruling on the pretrial motion was correct (Pet. App. A14). The court of appeals agreed that the invoices were properly admitted in evidence, but premised its conclusion on the ground that petitioner lacked standing to object to the seizure of corporate records (Pet. App. A5-A7).

It is clear that the invoices were properly admitted in evidence. Petitioner does not dispute the trustee's title to the invoices.[3] They were kept with petitioner's permission within a perimeter of space leased to him, but in a specific area set aside solely for Twin Lock. The trustee's representatives limited their activities to that part of the office occupied by Twin Lock and

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[2] Petitioner was apparently not present at the time the records were removed. He had turned away the trustee's attorney earlier that day. (Pet. App. A4).

[3] Twelve days after the taking of the records, the trustee petitioned the referee in bankruptcy for a turnover order, which was granted shortly thereafter (Pet. App. A11).

took only the corporate documents belonging to the trustee. In these circumstances, their entry into the outer office of the suite, with the permission of petitioner's secretary, was not an invasion of petitioner's rights.

Even if the conduct of the trustee's representatives in obtaining the corporate papers belonging to the trustee were regarded as a technical trespass, these representatives acted as private individuals,[4] unsupervised by any government agency and unconcerned with the prosecution. The purpose of the rule excluding evidence obtained by an unlawful search is to remove the incentive of government officials to disregard an individual's right of privacy. This purpose would not be served by applying an exclusionary rule in this case where no government agent was involved.[5] *Burdeau* v. *McDowell*, 256 U.S. 465; see *United States* v. *McGuire*, 381 F.2d 306 (C.A. 2), certiorari

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[4] The trustee himself is not a government agent. As the district court pointed out, such a person may derive his power from a court, but he serves for the benefit of creditors, and, like an attorney—also an officer of the court—cannot bind the government by his errant conduct (Pet. App. A13).

[5] *United States ex rel. DeForte* v. *Mancusi*, 379 F.2d 897 (C.A. 2), certiorari granted, Jan. 22, 1968 (No. 844, this Term), relied upon by petitioner, does not support his claim of standing. In that case the Second Circuit deviated from the customary rule and determined that, in the particular circumstances, a union official could object to a post-indictment search by state police agents of the union's one-room headquarters conducted in his presence and over his objections, and the seizure of union records where he had a considerable role in preparation of the records.

denied, January 15, 1968 (O.T. 1967, Nos. 666 Misc., 669 Misc., 670 Misc.).

2. The government did not seek to prove that petitioner personally prepared the false statements. Rather, the prosecution's evidence tended to show that he furnished the false information relied upon by those individuals who prepared the fictitious statements. The court's charge to the jury was tailored to the issues raised at trial. Among his instructions, the trial judge recited the underlying statute (18 U.S.C. 152), the elements of the offense, and the aiding and abetting provisions of 18 U.S.C. 2. Defense counsel did not object to the charge.

Petitioner has isolated a portion of the instructions on the elements of the offense, where the court charged that one violates the statute if he "made or caused to be made" the false statements. He now alleges that this instruction permitted the jury to convict him on a theory not asserted by the government, *i.e.*, that he made the false statements. Realistically, however, it would have been impossible for anyone to have concluded, in light of the evidence presented, that petitioner made the false statements. Moreover, other parts of the charge made it evident that the prime issue was the causal connection between petitioner's acts and the false statements. If the judge had been asked to eliminate the innocuous reference to guilt on the basis of having "made" the statements, he undoubtedly would have done so. There is clearly no basis for the claim that the charge contained plain error. *United States* v. *Mont*, 306 F.2d 412, 417 (C.A. 2),

certiorari denied, 371 U.S. 935; see *United States* v. *Edwards*, 366 F.2d 853, 869 (C.A. 2), certiorari denied *sub nom. United States* v. *Jakob*, 386 U.S. 908.

3. Contrary to petitioner's contention, there was ample evidence to support his conviction. The bankrupt corporation was heavily indebted to him, and he had furnished the funds for indemnity bonds required on occasions when a monthly income statement showed a loss. Since there was no need to supply additional funds if the company's monthly transactions were in the black, petitioner stood to benefit if the schedules submitted to the referee indicated a profit. The testimony of Zarett established that all of the schedules in question were prepared on the basis of information taken from Twin Lock's invoice files.[6] The secretary, who prepared the invoices, testified that the information could have come from three sources, two of which were eliminated by the testimony of Twin Lock's California plant manager and the various purchasing agents of the companies appearing as the purchasers on the false invoices. The logical conclusion, and the one properly reached by the jury, was that the fictitious information came from petitioner.

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[6] Zarett further stated that after preparing the statements, he discussed each one with petitioner, reviewing with him the sales figures (Tr. 71-72, 93, 96).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 290139 596